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Open and Shut Cases

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Chapter 1

Open & Shut Cases

Simon Lee¹

Abstract

Around the time of the birth of the Open University, Mr Justice Megarry set out a fundamental lesson on open-mindedness: “As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not ...’ *John v Rees* [1970] Ch 345, 402. This essay takes ten examples rarely explored in law schools to encourage reflection on how to keep an open mind, rather than succumb to prejudice in pre-judging people, cases or issues. ‘The path of the law’ was the title of a famous lecture by the great American judge, Oliver Wendell Holmes, which ends, as does this essay, by affirming such an unusual collection of stories: ‘The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.’

1. Introduction

Around the time of the birth of the Open University, Mr Justice Megarry set out a fundamental lesson on open-mindedness:

‘As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.’²

Fifty years after the case was reported, this insight needs constant reiteration as a safeguard against witch-hunts³ and as a positive encouragement to draw the most out of deepening our

¹ This essay began as my inaugural professorial lecture, delivered at The Open University on 4 May 2017. My grandson, Joshua Wright, was watching on-line in Switzerland at the age of two and a half, while my granddaughter, Madeleine Lewis-Oakes, was there in the lecture-hall on campus in Milton Keynes, aged 5 months. The essay is dedicated to them and to Madeleine’s brother, Theo, who was born in 2019. I am grateful to generations of students, to Lisa Claydon, other colleagues, friends and family for comments, especially my son, Jamie. The usual disclaimers apply, that others, particularly Joshua, Madeleine, Theo and Jamie, are not responsible for any of my errors, judgments or mis-judgments.

² Megarry J, *John v Rees* [1970] Ch 345, 402. [1969] 2 All ER 274 Quoted, for example, in Sandra Fredman & Simon Lee, ‘Natural Justice for Employees: the Unacceptable Faith of Proceduralism’ (1986) 15 *Industrial Law Journal*, 16. As a barrister and lecturer, Megarry had been prosecuted for submitting false tax returns but the judge directed the jury to acquit as there was no intention to defraud. The lingering effect on his career of this experience may have influenced Megarry’s emphasis on ‘unanswerable charges which, in the event, were completely answered’.

³ A prime example would be ‘Operation Midland’. A fantasist initially known as ‘Nick’, later revealed to be Carl Beech, claimed to have been abused by politicians and other public figures; the police and Tom Watson MP seemed to believe him, with terrible consequences for the reputations of others, and the well-being of them and of their families. After he was imprisoned for 19 years, the Henriques report set out some of the failings of gullible

understanding of law. It is the most significant dictum I have encountered in my studies of the law over five decades. It is beautifully expressed. It is original in its composition but it nods to the history of the law. It is rigorous in its sub-clauses but compelling in its overall message. In a sphere of life where hierarchy usually rules, it comes in a humble first instance decision, the facts and context of which are rarely recalled. It was initially missed by the system of court reporting but speaks to us over half a century later. It sums up the essence of open-mindedness, which is in turn the essence of law and justice. It warns against pre-judging, which is the root of prejudice. It hints at the possibility of redemption, which might be the hope of us all in an age given to harsh judgments of the past and of others in the present. It is, in essence, a plea against the rush to assume fault and a hymn, instead, to open-mindedness.

Critics bewail the practice of lawyers, as they see it, of relying on technicalities. In this essay, I focus instead on a nobler aspect of thinking like a lawyer, one which could be helpfully adopted in wider life, namely keeping minds open to the possibility that all is not as it first seemed. Such a mindset is wary of jumping in to judge a story on first, partial or even partisan, impressions. Approaching a problem with a closed mind is how 'prejudice' gets its name, because of the tendency to pre-judge a person or an issue.

Megarry's dictum gives a nobler understanding of why it is important that lawyers or others should be allowed to invoke the need for a fair process and why it would be wrong for their clients to be pre-judged. It is part of the art of lawyers to make their points in a compelling manner. Megarry's life-long practice of noting down aphorisms, publishing many in miscellanies,⁴ shaped his style. The phrase 'fixed and unalterable', for example, would be known to him as a description of the famously, or notoriously, inflexible decrees of the Medes and Persians, as attested in the Bible.⁵ Megarry's whole passage conjures up, even against such determined positions, the need in a just society for decision-makers to keep their minds open until they have considered the evidence.

In giving ten examples against which to test Megarry's wisdom, this essay broadens the range of materials routinely presented to law students and other citizens as emblematic of law. There is only one case here from the Court of Appeal and one from the Supreme Court of the UK, neither well-known. Some of these 'cases' did not even make it to court. Others are at the modest level of magistrate or other first instance decision-making. Each can only be sketched briefly, in a single paragraph. Each has been chosen as an antidote to assuming that an incident is open and shut. Megarry's dictum is not taken as providing a complete taxonomy of errors. Its sub-themes could be seen as tautologous, albeit that they were combined to great rhetorical effect. Instead, each of these ten sagas is presented as offering a particular insight into Megarry's broad and wise assertion about the path of the law. Few readers will warm to all the characters who are featured. Whoever is demonised in a reader's circle or by society is exactly the person whose case should be a touchstone for the application of Megarry's litany. The aim is partly to encourage the sharing of other experiences, other examples of 'open and shut cases that, somehow, were not', because restricting students to appellate hard cases or even uneasy cases is not conducive to a well-rounded, liberal education in, or through, the law. As the American academic and judge Charles E Clark observed of Karl Llewellyn, 'his principle of pedagogy' was 'not to tell his students truths, but to force them to seek out the answers themselves'.⁶

and reckless police officers although the report was redacted and so it took until late 2019 for the full scale of the mistakes to be widely known.

<https://www.theguardian.com/uk-news/2019/oct/04/operation-midland-met-police-boss-urged-to-consider-her-position>

⁴ Three *Miscellany-at-Law* books (Stevens, 1955) and one *Arabinesque-at-Law* (Wildy, 1969).

⁵ Esther i.19, Daniel vi.8.

⁶ C Clark, 'K N Llewellyn', (1962) 29 *University of Chicago Law Review* 614.

John v Rees

Although the *John v Rees* case was only reported in 1970, it was decided in 1968. Its context was an argument between members of the Labour Party in Pembroke, Wales. Desmond Donnelly, the MP for the constituency had published a book called *Gadarene '68*.⁷ The book's subtitle was 'The Crimes, Follies and Misfortunes of the Wilson Government'. Yes, that was a Labour MP attacking his leader and his government's policies, a practice which is common to many political parties in many countries, both before and after that era. A meeting of his constituency party called to deselect Donnelly, but not just for this, broke up in disorder. His supporters were summarily expelled from the party. The issue for Megarry J was whether they were entitled to a hearing before expulsion. Whether they should have been accorded that opportunity as a principle of natural justice. For all the reasons given below and for all the sub-clauses of Megarry's aphorism, a hearing might explain behaviour in such a way as to change the decision-maker's mind. This aspect of the turmoil in the local party was part of wider litigation which has been admirably explained by J Graham Jones.⁸ As for Desmond Donnelly, he was a complex character who described himself as an Englishman with an Irish name representing a Welsh seat, and who had been born in India, with, according to Donnelly, 'no personal racial prejudice at all – I grew up completely bi-lingual in English and Hindustani'.⁹ The paragraph in which that appears, however, has other controversial statements about the 'British problem ... At root it *is* a colour problem and of alien civilisations and incompatible habits' and he believed that what he claimed was his own lack of personal racial prejudice 'is not the case with the majority of the insular British people'. Donnelly was a maverick, a trouble-maker and a troubled soul. He hopped from one political party to another. He concluded that harsh book, *Gadarene '68*, with a beautiful manifesto of his own but he took his own life a few years later.

2. Opening up the Law

The Open University received its Royal Charter in 1969, the year after this case was decided. The judge's poetic reminder of basic propositions remains timely fifty years later. It speaks to the values of the Open University, which is one of the finest achievements of the very same Wilson government that Donnelly was berating. Megarry's aphorism encourages us to await a deeper understanding of the facts of a controversy, warning us against pre-judging or prejudice. At its most idealistic, it is encouraging open-mindedness. In this essay, a quartet of lessons illustrates Megarry's sub-clauses. In keeping with the spirit of the Open University's first law professor, Gary Slapper,¹⁰ original or at least unusual examples are used as a fresh alternative to the familiar cases presented to law students. In the tradition of inaugural lectures, I also offer a glimpse or two of my own path, or meandering, in the law. In the spirit of the Open University's mission, musings on these sagas are directed towards students in particular but all of us in general. Broadening out from the experiences of students who have been misjudged, we can then move from Megarry's strictures about errors towards a more expansive, positive approach to educating ourselves in and through the law.

1 Students in trouble with their studies, their university, or the police (or anyone in any trouble of any kind) can still succeed in the law and wider life. Ideally, any difficulties caused by others could be addressed through a fair hearing at the time but, if that does not happen, there are often later opportunities to explain what was initially assumed to be inexplicable.

⁷ Desmond Donnelly, *Gadarene '68* (William Kimber, 1968).

⁸ <http://www.pembrokeshirehistoricalsociety.co.uk/the-pembrokeshire-general-election-of-1970/>

⁹ *ibid* 189.

¹⁰ https://www.thetimes.co.uk/article/the-man-who-brought-law-to-life-85q0h3pm8_

2 It follows from such experiences that we should not rush to judgment when others are accused of behaving badly. Instead, we should hold on to the presumption of innocence, not pre-judging others, learning from reading fiction and watching detective dramas on screen that the most obvious suspect is not necessarily the guilty one, recognising that there *can* be smoke without fire, and that even if someone is convicted, there might have been a miscarriage of justice.

3 More positively, the converse of a miscarriage of justice, a delivery or perhaps a carriage, has its own impact: the unheralded humanity and dignity, under pressure, of a just decision under the rule of law has the power to transform individuals, communities and society.

4 It follows that we should always be refreshing our understanding of the characters and the character, even the genius, of the law and of wider life if we would like to become, or remain, open-minded.

These lessons combine to form a celebration of, and call for, cultivating open-mindedness in the law and in society through reflection on twelve supposedly open and shut cases.

The phrase Megarry uses, 'The Path of the Law',¹¹ is the title of a famous lecture given to Boston University law students at the end of the nineteenth century by the great American judge and jurist, Oliver Wendell Holmes, Jnr. He began by saying that the path of the law is not a mystery. That is where Holmes goes wrong. The law *is* a mystery and the *path* is the wrong metaphor. These points are related. A path is usually beaten through the most direct route but the law, like this essay, meanders or, as I would put it, has twists and turns. As Mark Twain observed, the African-American pilots on the Mississippi had to know the shape of the river, every bend, the depth at every point, and to be alert to the fact that the river is in constant flux.¹²

Of course, other disciplines are also full of excitement but when it comes to having fun, nobody can match the only other professor to have given an Open University inaugural lecture in law during these first fifty years, the late Gary Slapper, who invented and popularised a category of 'weird cases',¹³ which did so much to draw students and the public into an appreciation of the law. He had a serious intent, both in establishing himself and the Open University in the hearts and minds of lawyers and in educating us all.¹⁴

2.1 Categorising cases as weird, easy, hard, uneasy or not 'open and shut'

Although there are variations on the idea of 'weird' cases¹⁵, the more familiar expressions are that law students mostly consider 'hard' cases, as opposed to 'easy' cases. Hard cases are ones where lawyers reasonably disagree on the interpretation of the law. I have previously suggested a sub-set of hard cases which raise such moral qualms that I call them 'un-easy' cases.¹⁶ If you do not have a sense of ethical unease, whichever way you would decide, then you have probably not understood the moral issues and diverse perspectives at stake. This essay, however, addresses some of those supposedly simpler cases, the seemingly easy

¹¹ O W Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

¹² William G Bowen & Derek Bok, *The Shape of the River*, (Princeton University Press, 1998) see Mark Twain, *Life on the Mississippi*, quoted in the epigraph and at p275, Bowen and Bok, Preface at p xlix.

¹³ Gary Slapper, *Weird Cases* (Wildy, 2009).

¹⁴ For example, this tweet by Gary Slapper about lawyers' rivalry from their student days captures something about F E Smith, who became Lord Birkenhead:

<https://twitter.com/garyslapper/status/325180123055804417?s=20>.

¹⁵ eg 'misleading' or 'uncommon' cases, A P Herbert, *Misleading Cases in the Common Law*, 1927; *Uncommon Cases* (Methuen, 1935).

¹⁶ Simon Lee, 'Uneasy cases' in Brice Dickson & Paul Carmichael, *The House of Lords: Its Parliamentary and Judicial Roles*, (Hart, 1998); Simon Lee, *Uneasy Ethics* (Random House, 2003).

ones, those that appear to be open and shut cases, which are apparently strewn across the path of the law.

2.2 Towards open-mindedness

This essay argues that open-mindedness matters and needs to be developed through the guidance of this Megarry dictum and the often painful experience of practising, failing, trying again, still failing but still striving to be open to argument. This is the essence of a legal education but is much needed in wider life. If we pre-judge cases or issues as open and shut when they are not, then our prejudice can cause damage to other individuals, to communities, to society and to ourselves. More generally, we can all learn all the time from the study of law and of other disciplines to be more open to the evidence, to insights, to the truth, to the facts. This is especially important in an era dubbed as 'post-truth', a time of 'fake news'. Being or becoming open-minded is not itself an open and shut case. It requires humility, imagination, constant attention and a commitment to self-improvement.

Some people do not seem to *want* to be open-minded, at least on their core beliefs, or sense of identity, or their insistence that one factor can explain everything. Even for those who really do wish to be open-minded, not just to say we are, but actually to be or become or remain open, we have to think about it and work at it. So this essay is not a claim to be especially open-minded myself. It is more of a coaching manual for those who might surpass me in this endeavour.

2.3 The meaning of 'open and shut'?

As a start, what is it, in the open and shut metaphor, which is being opened and shut? We could be comparing a legal case, or any other issue, to the opening and shutting of a suitcase, a file, a door, a gate, a window or a book, to give a few examples. All of these can be partially opened or partially shut. Some can be shut but not necessarily locked. If Megarry's metaphor is going to work, is that which is being opened and shut the kind of thing which can be strewn over or around a path? Paths or, in my preferred imagery, rivers, are not usually strewn with windows, doors or books, although canals do have locks. It is our *minds* which are most likely being described as open or shut, or closed, when we consider Megarry's sub-categories of unanswerable charges, inexplicable conduct, fixed & immutable policies. An open mind is not an empty mind. Keeping your mind ajar is not about keeping it *in* a jar.

The ten incidents, not all 'cases' as normally understood, have been chosen partly for their obscurity, as otherwise readers would come to them with more of a risk of pre-judging, and partly because of the fame, or later fame, of some of the people involved or because I predict that greater fame will follow. The lessons of Megarry's dictum, though, need to be lived out in a different kind of obscurity, in the little steps we each take along the path of the law towards social justice. I am going to call these ten examples by the name of the principal character: Bob, FE, JK, Mrs P, Cornelia, Harper, Winston, Gerry, Eamon and Jennie.

(1) Bob: informed questioning can reveal distortions in an official's view of events

A postgraduate student, Robert, who already had a first class undergraduate degree in Law, was found guilty of dangerous driving on the word of two police officers and fined £40. This was in Oxford decades ago. The same student then pleaded guilty to attempting to steal a street-lamp and was fined £5. The second offence was missed, or glossed over, by the media, this mattered to the defendant who had political ambitions. Then, on appeal against his conviction for dangerous driving, his barrister had a problem in wishing to cite his client's clean driving record and challenge the police officers account for fear of allowing the prosecution to reveal Robert's other conviction. The strategy was not to put the defendant on the stand but to produce a witness, the fellow passenger. That student failed to turn up on time. The court

adjourned. Eventually, the witness arrived, looking dishevelled. The judge asked why he was late. He said defiantly that he was playing rugby for his college. At this point, the case seemed open and shut. What happened next? The deputy recorder asked which college the witness was representing. No, it was not the judge's college but it was his father's college. It was their first cup final. So things started to look up and then the court became more open-minded to the idea that the police might be lying. The barrister for the defendant asked the two police officers the same question, without the other one present in court to hear the answer: was the window, through which the defendant was said by them to have made an obscene gesture, fully down or three-quarters down? One said fully, one said three-quarters. Since the barrister knew from the defendant that neither could be true, because the window of the van did not open or shut like that but had one fixed panel and one sliding panel which could only be partially pushed out sideways, it was game, set and match to the defendant. Well done, that barrister and that witness for the defence in the 1950s. The defendant was a Rhodes Scholar at Oxford, Bob Hawke, who was elected Prime Minister of Australia in 1983, 1984, 1987 & 1990.¹⁷

(2) F E: such differing accounts do not necessarily mean perjury by an official

A second case takes us back to 1897, when the Prince of Wales was visiting Oxford and was met by a demonstration. Metropolitan Police on horseback, supplementing the local constabulary, made lots of arrests including a Mr Smith,¹⁸ a young don who had recently graduated with the Vinerian Scholarship for the best papers in the Bachelor of Civil Law which, despite its name, is a Masters degree. The police arrested Smith, put him in a cell overnight and charged him with assaulting a police officer and obstructing the police in the discharge of their duty. Great law professors came to his aid. Dicey wrote to him, offering £5 towards a barrister for his defence, and sat in the front row of the magistrates' court alongside Professors Anson and Markby. Smith defended himself. He challenged the police officer's evidence that Smith had hit him, claiming that he, Smith, had kept his hands behind his back. The prosecutor asked, 'What do you mean by accusing this officer of wilful and corrupt perjury?' Smith said that perjury was only one of five possibilities. Another was that he himself was committing perjury. A third was that the police officer was honestly mistaken. The fourth was that he himself was honestly mistaken. And the fifth was that the apparently irreconcilable accounts were somehow reconcilable (which could have been another phrase in Megarry's list of open and shut cases). Smith, often known by his initials F E, was acquitted and later became the Solicitor-General, then the Attorney-General and then, as Lord Birkenhead, the Lord Chancellor. In the middle of that sequence, he asked Dicey, in his eighties, to appear with him as counsel for the Crown in a House of Lords appeal during the First World War, on whether the royal prerogative survived when a statute was passed, a gesture which was, I suspect, a generous nod towards Dicey's support in 1897.¹⁹

(3) J K: avoid pre-judging a case because we like or dislike one of the litigants

There was a claim a decade ago against the author J K Rowling of misappropriating a virtually unknown author Adrian Jacob's ideas in a work of fiction. A similar charge is often made against musicians, from George Harrison to Led Zeppelin. J K Rowling sought to have the case struck out but the judge thought there was a possible case. Nobody doubts that J K Rowling created Harry Potter as a work of originality. Suppose, however, that her agent had

¹⁷ Simon Lee, *Vincent's 1863-2013* (Third Millennium, 2014), 111-112, referring to Blanche d'Alpuget, *Robert J Hawke: A Biography* (Penguin, 1984).

¹⁸ This is the Smith about whom Gary Slapper tweeted concerning his prize and the runner-up, Holdsworth, fn15 <https://twitter.com/garyslapper/status/325180123055804417?s=20>.

¹⁹ Simon Lee, 'Dicey Sentiments', U.K. Const. L. Blog (29th November 2016) <https://ukconstitutionallaw.org/2016/11/29/simon-lee-dicey-sentiments/>.

many years before received Adrian Jacob's manuscript of a children's story about a wizard, rejected it and genuinely forgot about it. Suppose now that the agent in conversation offers some ideas to the author when she is under pressure to meet deadlines for sequels and honestly forgets that some of those ideas have come from Adrian Jacob's earlier manuscript. J K Rowling is innocent of any conscious wrongdoing and is accordingly indignant and was able to 'win' the case in the eyes of the media if only because Adrian Jacob's estate could not afford to pay J K Rowling's and her publisher's legal costs into court so the action was discontinued.²⁰ But the truth of what happened is not open and shut. It is obscure and sometimes one side cannot afford the cost of access to justice. The agent is dead, the relatively unknown writer is dead, the famous author's notebooks were not yielded up in the course of litigation, and accounts differ as to whether the agent and the almost unknown author only met once, as the agent claimed, or more often, as Adrian Jacob's estate claimed and as both had homes on the small Maltese island of Gozo. It is perfectly possible, however, that an idea was transmitted and absorbed without any bad faith on the part of anyone.

(4) Cornelia: an advocate who has herself experienced discrimination can help a vulnerable defendant weather the storm

Cornelia Sorabji²¹ has been described as India's and the UK's first woman barrister and as Oxford's first female law student. There can be quibbles about the technicalities of being called to the Bar but without doubt she was a pioneer of women in the law, both in India and in the UK. She is variously reported as having been appointed as the Legal Assistant or as the Lady Assistant to the Court of Wards. Her first case was different. It was what our Open Justice²² initiative would call 'pro bono'. On returning to India in 1894, having studied in England, she was not allowed to qualify as a barrister (actually, for decades) but was asked nonetheless to help a woman accused of murdering her husband. Cornelia Sorabji recognised that the Statutory Law of India allowed 'any person' to defend the accused and the Bombay High Court confirmed that therefore a woman could appear in court. Witnesses were openly being bribed by the prosecution who had charged a woman with the murder of her husband. The case seemed open and shut. Sorabji realised that there was something even more elemental than the lure of money in a disadvantaged rural community, namely the weather. She persuaded the all-male jury that in the monsoon it would not have been possible for the body to have been left in the pools of blood in the location in which it was found, on a steep slope. The blood and the body would have been washed down the hill. It was much more likely that the murderer was the chief 'witness' against the accused, a man in debt to the murder victim, who then planted the body and blamed the victim's wife.

(5) Mrs P: outsiders appreciating the traditions of fair play

The accusation of racism is often thrown at politicians and political institutions. For example, it seems inexplicable to some that the Home Office would do this or that, or not do this or that, unless it is because the decision-maker is racist. At the time of writing, we have a Home Secretary from an ethnic minority background, Priti Patel, as was her immediate predecessor Sajid Javid, but the department is still accused of racism. Conversely, the Home Office is often praised for its comparative liberalism under Roy Jenkins as Secretary of State in the Labour governments led by Harold Wilson from 1965 to 1967 and again from 1974 to 1976. But I have written about a lost or neglected case²³, one in which the Home Office in the midst of that Jenkins era's legislation against sex and race discrimination, tried to delay an Indian and a Bangladeshi woman from exercising their partial rights to citizenship. Mrs Phansopkar and

²⁰ Allen v Bloomsbury & Another [2010] EWHC 2560 <https://www.bailii.org/ew/cases/EWHC/Ch/2010/2560.html>.

²¹ Cornelia Sorabji, *India Calling: the Memories of Cornelia Sorabji* (Oxford University Press, 2001); Richard Sorabji, *Opening Doors: the Untold Story of Cornelia Sorabji* (I B Tauris, 2010).

²² Open Justice <http://law-school.open.ac.uk/open-justice>.

²³ Simon Lee, 'Lord Denning, Magna Carta and Magnanimity' (2015) 27 *Denning Law Journal* 106.

Mrs Begum were refused entry at Heathrow and told to go back home, to India and Bangladesh, to apply, where the queue would take fourteen months. The Court of Appeal found for the women using creative arguments including one from Magna Carta in the thirteenth century, that justice delayed is justice denied. The two barristers in this case had themselves been refugees. One of those, Sibghat Kadri QC, had himself been interned without trial as a student in Pakistan, before securing his own release with a writ of habeas corpus. The Home Office claimed that it would have been 'queue-jumping' for the women to have their citizenship decided at Heathrow. The judges saw the case differently, that the underlying value of the law was in vindicating their rights swiftly.

(6) Winston: it is never too late for technology to re-open a shut case

Winston Silcott was tried for three murders in the 1980s but did he actually commit any of them? He was acquitted of the first. When he was convicted of the third, it emerged that he was on bail for the second. MPs called for the judge who let him out on bail to resign. On the next day's BBC Breakfast TV and ITN News at lunchtime, I commented on this breaking news. Even then, it was important to bear in mind that Winston Silcott could appeal and that those accusing Judge Lymbery of inexplicably giving him bail were legislators who had determined the framework within which the judge made that decision.²⁴ The campaign by the women of the area²⁵ played a huge part in challenging the perception that Silcott was guilty. I like to think that in continuing to discuss the iniquities of such cases when I moved to Queen's University Belfast I might have sparked, or at least not dampened, the interest of law students there, one of whom went on to be Winston Silcott's courageous and determined solicitor on this side of the Irish Sea. Tony Murphy²⁶ eventually succeeded in getting the conviction quashed and continues to argue that the conviction for the murder of the second, for which Winston Silcott served seventeen years in prison, was wrong because the killing was in self-defence. Those who believe there is no smoke without fire will be susceptible to the line that someone in this position has been released on a 'technicality'. So it is important to emphasise that there never was any scientific evidence that connected Winston Silcott to this third murder, of PC Keith Blakelock in the Broadwater Farm or Tottenham riots, no image of him on any of the extensive CCTV footage of the riots that evening, suggesting that he was in his sister's flat, as he claimed, observing the curfew of his bail condition and keeping out of trouble, there was no confession and only unreliable claims by youngsters that he was the leader of the gang. Silcott allegedly stated that they would not stand by those claims in court, and this was interpreted as a kind of admission of his involvement. What tipped the balance on appeal against conviction was that the invention of ESDA testing which showed that this ambiguous statement was not actually made by Silcott but was added later, made up by the police²⁷. Electrostatic deposition analysis can show whether notes were made contemporaneously by examining the indentations on subsequent pages.

(7) Gerry: opening up official records can re-open a shut case decades later

To give a sense of the time-span involved in righting this next wrong, the first Open University graduation took place on 23 June 1973 and the relevant decision by a government minister, an interim custody order (ICO) was taken on 21 July 1973. The UK Supreme Court made its decision in May 2020,²⁸ concluding that Gerry Adams had been interned unlawfully in 1973

²⁴ Simon Lee, 'Bail Conditions' (1987) 103 LQR, 327

²⁵ Legal Action for Women, *A Chronology of Injustice* (Crossroads, 1998)

²⁶ <https://www.theguardian.com/uk/2003/oct/20/ukcrime>

²⁷ <https://www.theguardian.com/fromthearchive/story/0,,1092766,00.html>

²⁸ R v Adams [2020] UKSC 19, [2020] 1 WLR 2077, <https://www.supremecourt.uk/cases/docs/uksc-2018-0104-judgment.pdf> Lord Kerr: 'At stake on this appeal is the validity of the ICO made on 21 July 1973. Although an ICO could be signed by a Secretary of State, a Minister of State or an Under Secretary of State, the relevant

and so could not have been guilty of attempting to escape unlawfully. Mr Adams was widely believed to have been a leader in the IRA but was certainly known later in the 'Troubles' to be President of Sinn Féin, an abstentionist MP and a major figure in the peace process, notably in the Adams-Hume dialogue. Along the way, he was one of the people whose voice had to be dubbed and/or subtitled, when the broadcasting restrictions were in force from 1988. When I left Queen's University Belfast in 1995, both the leading counsel in this case, Sean Doran QC for Mr Adams and Tony McGleenan QC for the Secretary of State, were colleagues in the Law School and the latter had been one of my first students there. At the same time, Sir Brian Kerr was a High Court judge but now he was the presiding judge in this appeal, who gave the main judgment with which his fellow Justices all agreed. In between times, he had been the Lord Chief Justice of Northern Ireland. His predecessor but one, then Sir Brian (later Lord) Hutton, was the barrister who, as leading counsel to the Attorney General in 1974, gave his opinion that the order in 1973 was not lawfully made. This was because in Brian Hutton's view, endorsed 46 years later by the Supreme Court, it should have been the Home Secretary himself, not his Minister of State, who had to consider the case of Mr Adams. It was only when Cabinet papers were released many years later that Gerry Adams' lawyers became aware of this and brought the proceedings which eventually resulted in this judgment.

(8) Harper: as fiction shows, characters evolve

In watching films and television, and in our crime fiction reading, we know that the case is not as open and shut as it first seems, the obviously guilty person is usually innocent and the seemingly innocent are the ones to watch. In *Broadchurch*, *Line of Duty* or any number of episodes of *Morse*, *Lewis*, *Endeavour*, or *Midsomer Murders*, we do well to remember the presumption of innocence. In series 3 of *Broadchurch*, for example, there was such an unedifying collection of men in the small town, including a recently released rapist, that we could suspect them all. The challenge is to ask why can we not be as discerning, imaginative and yet measured in viewing politics, law and the media in real life as we have become adept at suspending judgment in our watching of crime drama? Instead, we are ready to think the worst of others, to believe that our real life and our fictional heroes are villains after all. In Harper Lee's *To Kill A Mockingbird*,²⁹ Atticus Finch, for instance, was a hero to Barack Obama and many others but has now been written off as a 'racist' by some after the publication of another book by Harper Lee, *Go Set A Watchman*.³⁰ At Queen's University Belfast in the early 1990s, we had asked all first year law students to write a very short sequel to the one book

legislation provided that the statutory power to make the ICO arose "where it appears to the Secretary of State" that a person was suspected of being involved in terrorism. There is no evidence that the Secretary of State personally considered whether the appellant was involved in terrorism. On the assumption (which is common to the parties to the appeal) that he did not, the question arises whether the ICO was validly made.

'5. The reason that this matter has come to light so many years after the appellant's convictions is that under the "30-year rule" an opinion of JBE Hutton QC (later Lord Hutton of Bresagh) was uncovered...

'6. Mr Hutton was the legal adviser to the Attorney General when he gave his opinion. It was dated 4 July 1974 and responded to a request for directions in relation to a proposed prosecution of the appellant and three others involved in the attempted escape on 24 December 1973. Mr Hutton concluded that a court would probably hold that it would be a condition precedent to the making of an ICO that the Secretary of State should have considered the matter personally.

'7. The appellant became aware of Mr Hutton's opinion in October 2009. He had not appealed his convictions before then. Sometime after learning of the opinion, he applied for an extension of time in which to appeal his convictions... the power invested in the Secretary of State by article 4(1) was a momentous one ... The provision did nothing less than give the Secretary of State the task of deciding whether an individual should remain at liberty or be kept in custody, quite possibly for an indefinite period ...

'39... there was no reason to apprehend (at the time of the enactment of the 1972 Order) that this would place an impossible burden on the Secretary of State. Indeed, the subsequent experience with Mr Merlyn Rees scotches any notion that this should be so...

'41. The making of the ICO in respect of the appellant was invalid. It follows that he was not detained lawfully. It further follows that he was wrongfully convicted of the offences of attempting to escape from lawful custody and his convictions for those offences must be quashed.'

²⁹ Harper Lee, *To Kill A Mockingbird* (Heinemann 1960).

³⁰ Harper Lee, *Go Set A Watchman* (HarperCollins, 2015).

they had almost all studied at school, Harper Lee's *To Kill A Mockingbird*. They asked for a 'model answer' which, of course, was missing the point and beyond me but I did eventually write my own response to the task. It was then published in the second edition of our book of teaching materials from this pioneering course on learning legal skills.³¹ A quarter of a century later, it emerged that Harper Lee had written her own 'sequel' or, to be precise, that the novel we knew was developed at the suggestion of an editor from her original manuscript. My version can now be compared with Harper Lee's *Go Set A Watchman*. In mine, the young girl narrator, Scout, is now known by her proper name, Jean Louise, and is being appointed as the first woman Justice of the United States Supreme Court. In Harper Lee's own version, she is indeed known as Jean Louise, but is in a dead-end job. In mine, she cares for Atticus Finch, her father, in his dying moments. In Harper Lee's version, she is outraged by Atticus and denounces him as a racist. But media reports that Atticus *is* a racist are not the last word. Harper Lee was, in my opinion, drawing not only on her father's legal career but also on the life of the father of one of her fellow law students at the University of Alabama. Hugo Black had been a member of the Klu Klux Klan when seeking election to the US Senate but he became one of the most liberal of US Supreme Court Justices in history. Atticus was not a Klan member but had encountered the Klan and other racists. The charge of racism against Atticus is not unanswerable. Indeed, it is answered in *Go Set A Watchman* by Atticus's brother, Jack. Part of the point back in the 1990s was to challenge students to write a chapter in a book composed by others, much as judges are writing a chapter in the story of the common law, where earlier chapters were written by others. Partly, it was to encourage students in Northern Ireland to walk in someone else's shoes, to see the world from someone else's porch. Partly, it was to build on a shared experience. I would like to think it was one of a host of ideas that contributed in a small way to influencing the mind-sets of a generation of influential people in Northern Ireland. Former students have told me that this was a formative experience which acquired even more meaning twenty-five years later when they could judge their version against not only mine but, more importantly, Harper Lee's. The title *Go Set A Watchman* comes from the Bible and indicates that part of maturing as a person is to develop one's own conscience, not to rely on a father figure or any other hero but to take responsibility for one's own judgment calls.

(9) Eamon: when justice prevails, rather than miscarries, it can be transforming

The converse of a miscarriage of justice, a delivery or perhaps a carriage, has its own impact: the unheralded humanity and dignity, under pressure, of a just decision has the power to transform individuals, communities and society. The starting point here is a judge keeping an open mind under intense pressure. Even some of the enemies of the state can end up respecting the open-mindedness of the judiciary. I admired the courage, integrity and independence of Mr Justice Higgins and wrote his obituary for *The Guardian*,³² when he died in 1993. But four years later, a more powerful tribute came from a convicted murderer, IRA man, Open University and Queen's law student, Eamon Collins, who was himself later murdered by the IRA. He was tried by Mr Justice Higgins, acting as judge and jury in a Diplock Court, who acquitted him in 1987 of another murder charge. Collins had spent two years on remand. Ten years later, he crafted a remarkable tribute to the judge and the rule of law:

'there could be such a thing as the impartial application of the rule of law ... the contrast with our revolutionary justice was extreme... What he was saying was that in his eyes, the prosecution had failed to exclude the reasonable possibility that I had been treated in such a way as to constitute inhuman or degrading treatment. So even though he suspected I was guilty as hell, he was willing to let me walk free ... I could feel nothing but admiration for this judge who, on such a fragile legal abstraction, had set free a

³¹ Simon Lee, 'Lawyers were children once' in Simon Lee & Marie Fox, *Learning Legal Skills*, Blackstone, 2nd edition, 1994, 304-305.

³² Simon Lee, 'Justice without fear or favour', *The Guardian*, 7 September, 1993.

man from an organization which even during the trial had tried to murder him by firing a rocket at his home.³³

This was despite the fact that Eamon Collins himself believed that 'ordinary' people on the Clapham omnibus 'would probably have liked to have seen me hung, drawn and quartered, with my entrails fed to rabid dogs, and my head stuck on a pike for public edification'.³⁴ No wonder, then, that Eamon Collins explained that, 'the judge's words had sent a real shock through my body. I felt peculiarly emotional about them'.³⁵

(10) Jennie: consider an experiment in prejudices

One of the principal founders of the Open University was Jennie Lee MP, the minister given responsibility by the Prime Minister Harold Wilson in the 1960s for making a 'University of the Air' happen. In the 1920s, as a student at Edinburgh, she had conducted what she called 'An Experiment in Prejudices'. She gave all her student notebooks to the Open University. The OU's archivist, Ruth Cammies, had helped me in the preparation of my inaugural lecture in 2017 and, knowing of my interest in institutional history, mentioned to me that this archive existed. I read through all the hand-written student notes deposited by Jennie Lee and asked permission to publish her account of a student project she undertook in Psychology. This was run in our Year of 'My-gration', a sequence of 250 blogs in 2018, which was, as far as I am aware, the first time that her account of this particular experiment has been made public.³⁶ Her analogy of the mental and physical well-being and education of children has a particular resonance in 2020, given the Covid 19 pandemic and the dramatic actions, including lockdown and the closure of schools, taken to protect children and adults. For Jennie Lee believed that:

'if poverty and war are to be abolished, the schools must make it their duty to search for and destroy harmful anti-social germs in the mind of children as rigorously as disease germs are removed from their bodies...I carried out an experiment with five groups of children, averaging forty-five in each group. They were selected from schools in varied environments, a rural area, a small town, a large town, a mining village and an aerodrome centre. The children were given a list of the nations of the world and asked to write opposite each country whether they liked, disliked, or were indifferent to its inhabitants, and WHY.'

Jennie Lee conceded that, 'Such an experiment takes no claim to scientific thoroughness' but concluded:

'what an indictment of our educational system that only two out of two hundred and twenty two children had learned to do their own thinking and to reply in most cases that they had no opinion as they did not know enough to form one.'

Jennie Lee was studying Law and Education, as well as Psychology. An undergraduate project in one of her three subjects over ninety years ago could not be expected to satisfy the standards of a major research project today but the spirit of her inquiry and the basis of her concern, arising out of reading the latest literature available to her, has much to commend it. Her initiative reflects her character, the breadth of her outlook and her passion for countering prejudice through education, all of which stood her and us in good stead when she led the creation of the Open University.

³³ Eamon Collins, *Killing Rage*, (Granta, 1998) 339-341

³⁴ *ibid* 340

³⁵ *ibid* 339

³⁶ http://www.open.ac.uk/research/news/day-4-year-mygration_

3. Conclusion: a never-ending striving to be open-minded

These first fifty years of the Open University are not, of course, the beginning or the end of understanding an open-minded approach to law and to life. Nevertheless, there was a kind of genius in the origins of the Open University, in more than one sense. The first Chancellor, Lord Crowther, famously said that the University should be 'open to people, places, methods and ideas'.³⁷ It was the most imaginative and pioneering of new universities, with the most imaginative and pioneering approaches to widening access and lifelong learning. The government that brought us the Open University was the same one, led by Harold Wilson, that was so criticised by one of its own backbenchers, Desmond Donnelly, with whose story this essay began and which gave rise to the Megarry observation about open and shut cases.

A contender for the accolade of the most open-minded lawyer or politician or public figure of the twentieth century in this country would be the Lord Chancellor in that Wilson government, Gerald Gardiner. He fought in the First World War but was a conscientious objector in the Second, when he served with a Friends' Ambulance Unit (although not a Quaker himself). In the early 1950s, he successfully represented Jennie Lee and Michael Foot in the House of Lords in a libel action brought by Lord Kemsley against Tribune newspaper³⁸ and, most famously, in the early 1960s he successfully defended Penguin's publishing of Lady Chatterley's Lover in the courts. As a radical Lord Chancellor, he established the Law Commissions and led the Practice Statement declaring a change in our highest court's approach to precedent.³⁹ He brings us back to the cases of Bob and F E who are not the only people to have reached high office in law or politics after finding themselves in trouble with the authorities as students. Gerald Gardiner had graduated from Oxford with Fourth Class Honours in Law, just after the First World War, before achieving the rare feat for a postgraduate student of being expelled.⁴⁰ He was summoned by the Vice-Chancellor, Lewis R Farnell⁴¹, and summarily dismissed for having published a pamphlet by a recent graduate. Her essay was critical of women's colleges for being restrictive. The principals of the women's colleges were indignant and Gardiner was punished. Dilys Powell, the author, went on to become one of our foremost film critics and an expert witness for the defence in that Lady Chatterley's Lover trial. Women's colleges, Gerald Gardiner and universities went on to become more liberal, more open, more imaginative. What did Lord Gardiner do in retirement, while being Chancellor of the Open University? He enrolled as an undergraduate student.⁴² In the inaugural lecture from which this essay is derived, I gave Lord Gardiner the last word, by playing a video of him recalling that he had told the Wilson Cabinet that the Open University would be remembered as their government's greatest achievement. That government opened our minds directly through the Open University and indirectly with the stimulus the OU gave to other universities and to people everywhere to find new ways to learn at all stages of life. For students, including researchers, of the law, this means we have to be open to other disciplines and people who think differently to us, open to going out into places where the path of the law has rarely strayed, to seek to understand the perspectives of the marginalised, no longer voteless but still voiceless, or at least only heard uneasily when they burst through our sound-proofed bubbles.

³⁷ OU archives, Year of My-gration, 2018, http://www.open.ac.uk/research/news/day-4-year-mygration_

³⁸ Kemsley v Foot & Another 1952 AC 345 <http://www.uniset.ca/other/cs3/1952AC345.html>

³⁹ [1966] 1 WLR 1234.

⁴⁰ Muriel Box, *Rebel Advocate* (Victor Gollancz, 1983) 42.

⁴¹ L R Farnell, *An Oxonian Looks Back* (Hopkinson, 1934), records with some pride some other illiberal tendencies in his leadership roles but even he is not beyond redemption. He once saw and praised an illiterate tram conductor in Germany who recognised and treated kindly a Nobel Prize-winning Roman lawyer, Mommsen. Farnell recognised a genius in more than one sense here, a respect for lifelong learning in the German people.

⁴² Box, *ibid* 214, graduating in Social Sciences in 1977.

I learned at Yale Law School that any argument is but one view of the cathedral.⁴³ That allusion is to Monet's studies of the Cathedral at Rouen. Monet chose different times and seasons to capture the atmosphere differently, though he painted from the same vantage-point. If we imagine painters all around the cathedral or all around the metaphorical public square, each impression tells us something about the ostensible object but also something about the perspective of the artist and the atmosphere in between the two. For example, whether we are painting a picture of a cathedral or of the law or of politics, the view can be very different from the left or the right. The whole story cannot be discovered from the outside. We need to explore the life and purposes of a cathedral from the inside in order to understand it.

One of the things law does is to provide a focus, a subject to paint, rooting our discussion of high-minded values in particular, often low-level sets of facts, usually with a need for a decision one way or another. So why does law capture our attention? Part of it is to do, of course, with the authority of the law, its combination of moral stance and the coercive power of the state. But it is also partly to do with its drama and its ability to distil some abstract issue into a practical question, usually in the context of a specific dispute, a case wending its way through the courts. The media love the opportunities given by sport, court cases and parliamentary votes to speculate on who will win, to report on what happens and then to analyse why people won or lost. There is a danger in all this of legal fetishism, that we become fixated on the law as a false target. Similarly, the underlying danger of the 'open and shut' attitude is that we become fixated on our initial hunch and are reluctant to hear alternative explanations of an issue.

Challenging such closed-mindedness is not the preserve of the Open University or of the last half-century. For example, Francis Bacon's critique of received wisdom, written in 1620, identified four false idols, giving them names which could sound fresh in a 2020 business school tract on marketing and leadership, the idols of the Tribe, the Cave, the Marketplace and the Theatre. Bacon was writing in Latin but an English translation of his point against what might now be called groupthink or confirmation bias (the first half of XLVI) runs thus⁴⁴:

'The human understanding when it has once adopted an opinion (either as being the received opinion or as being agreeable to itself) draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects, in order that by this great and pernicious predetermination the authority of its former conclusions may remain inviolate.'

Each age needs to have this emphasised in its own way. Forty years after Bacon, Matthew Hale, later Chief Justice, wrote '*Things Necessary to be Continually had in Remembrance*', rules or reminders to himself on his initial appointment to the Bench in 1660:⁴⁵

'That in the execution of justice, I carefully lay aside my own passions, and not give way to them however provoked.
That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard.
That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard...
That I be not biased with compassion to the poor, or favour to the rich in point of justice.
That popular or court applause or distaste, have no influence into any thing I do in point of distribution of justice.

⁴³ G Calabresi and A. Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089.

⁴⁴ F Bacon, *Novum Organum*, 1620.

⁴⁵ Matthew Hale, *Things Necessary to be had Continually in Remembrance*, 1660, reprinted eg by Merrymount Press, 1937 and quoted eg in Tom Bingham, *The Rule of Law*, (Penguin 2010).

Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.'

To have these things 'continually' in mind is a challenge. As Bowen & Bok conclude their examination of race in American universities and society, 'The "river" that is the subject of this book can never be "learned" once and for all'⁴⁶, referring to Twain's realisation that the great river had to be learned upstream and downstream. So striving to live out Megarry's call to open-mindedness is an unending task. Every day, we can find further examples of seemingly 'open and shut cases which, somehow, were not'.

Just as Hale was putting the spirit of Bacon into reminders to himself, Megarry was consciously echoing Holmes from seventy years before. Very few people now read through to the conclusion of Holmes' lecture on *The Path of the Law* but it ends with this affirmation of a quirky and abstract collection of incidents:⁴⁷

'The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.'

⁴⁶ William G Bowen & Derek Bok, *The Shape of the River*, (Princeton University Press, 1998).

⁴⁷ n11 above, 478.